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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 551

CLEO FRANCIS HUGHES, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, CLEO FRANCIS HUGHES, respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, to review the Opinion and Judgment of said Court entered in this case July 26, 1963.

OPINIONS BELOW

There was no Opinion in the District Court. The Opinion of the Court of Appeals (Pickett, Seth and Phillips, Circuit Judges) has not yet been reported, but a copy is appended hereto (Appendix I) and made a part hereof by reference. No Opinion was rendered on the Motion for Rehearing. There is also appended hereto (Appendix II) and incorporated by reference a copy of the Petition for Rehearing.

STATEMENT OF JURISDICTION

The order and the judgment of the Court of Appeals for the Tenth Circuit sought to be reviewed were both dated July 26, 1963. A Motion for Rehearing duly filed was denied on August 15, 1963, and an Order staying the mandate until September 15, 1963, or until determination of the petition for writ of certiorari, was entered on August 15, 1963. On the 13th day of September, 1963, an Order Extending the Time to File Petition for Writ of Certiorari to and including October 14, 1963, signed by Mr. Justice Byron R. White of this Court, was filed in this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether through prejudicial examination of the defendant's expert witness by the Court which (1) presumed by the question that the defendant was guilty, or (2) which sought and obtained an agreement from the expert witness as to the guilt of the Defendant, the petitioner was denied his right to jury trial under the Sixth Amendment to the Constitution of the United States.

2. Whether the Defendant was denied a fair trial and the protection of due process of law under the Fifth and Sixth Amendments to the Constitution of the United States through the introduction of extraneous and inflammatory evidence inferring the commission of other crimes with no independent or direct proof that the Defendant was the perpetrator of such other crimes.

CONSTITUTIONAL PROVISIONS INVOLVED

The following constitutional provisions are involved, and are quoted herein in full:

Fifth Amendment to the Constitution of the United States

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to the Constitution of the United States

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the wit-

nesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT

The petitioner was indicted by an eight count indictment charging one count of violation of 18 U.S.C. 1463, a felony, one count of violation of 18 U.S.C. 1461, a felony, mailing obscene matters; and six counts of violation of 18 U.S.C. 1718, misdemeanors, being matter calculated to reflect injuriously upon the character of another. Under a plea of Not Guilty, the defendant on the trial of the matter undertook to prove (1) that he did not commit the acts charged, and (2) that if he had committed such acts he was not guilty by reason of insanity. In support of the second defense, the defendant called a psychiatrist who testified that from his examination of the petitioner it was his conclusion that if the petitioner had committed the acts with which he was charged, the acts were a result of a mental illness of a long duration and that the petitioner had no control over the commission of the acts. (Tr. 103, 104) The court properly instructed on this definition of insanity. (Tr. 169) The court, after direct and cross-examination, undertook to examine the psychiatrist and ask the following questions:

> "Q. (By the Court) Tell me for my information, Mr. Hughes was associating with a lot of people besides the Slussers, what is there in this thing that would indicate to you that he would select her as the victim of these letters?" (Tr. 111)
>
> "Q. You don't say he is insane but you say he wrote these letters, used a typewriter or mimeograph but he has no recollection of it? A. Yes, sir." (Tr. 112)

The Court of Appeals ruled that these questions by the court were not invasion of the petitioner's right to trial by jury (Opinion pp. 8, 9). The government introduced evidence that eleven separate people had received material of an extremely obscene nature other than through the mails (as alleged in the indictment). In no instance could any of the eleven persons identify or in any way connect the defendant with the delivering of such material. (Tr. 57, 60, 64, 65, 66, 67, 69, 70, 71, 94). Also introduced by the government was evidence of an anonymous telegram received (Tr. 53) and an anonymous gift of candy with no identification of the defendant as the sender. (Tr. 56). There was also testimony that an address book of the complaining witness was mysteriously missing from her residence without any identification of the defendant as the person who removed the address book. (Tr. 32, 33). The eleven-year-old daughter of the complaining witness was allowed to testify that she had received an extremely obscene and lascivious letter delivered to her at school (not through the mails), which letter was introduced into evidence without any identification of the petitioner as the person who delivered it. (Tr. 77). The entire matter was sought to be tied together by a threat of the petitioner to "get even" with the complaining witness and to make her children sorry she was their mother. (Tr. 35, 36). There was also evidence that the defendant had exhibited certain "bad" dittoed material to the complaining witness and had stated that the first would be delivered the next morning. (Tr. 36). There was no evidence that any material was delivered the next morning or in any near time relation. The matters in the indictment material and the "other

crimes" were sought to be tied together by an approximate 50%, at most, correlation in common spelling errors. (Tr. 85, 86)

REASONS FOR ALLOWANCE OF THE WRIT

1. The two questions presented herein embody questions of Federal and Constitutional law which have not been but which should be settled by this Court.

2. The record discloses such a patent and gross violation of the petitioner's rights under the Sixth Amendment to the United States Constitution as to call for the exercise of the supervisory power of this Court to correct the error below.

3. The decision herein is in conflict with the decision of the Fifth Circuit in *Blumberg* v. *United States*, 222 F. 2d 494, and the District of Columbia Circuit in the case of *Blunt* v. *United States*, 244 F. 2d 355, and this Court in the case of *Starr* v. *United States*, 153 U.S. 614, 14 S.Ct. 919, 38 L.Ed. 841, holding that the constitutional guarantee of trial by jury prevents a trial judge from urging his own view of the guilt or innocence of the accused upon the jury.

4. The decision herein is in conflict with the decisions of the Ninth Circuit, *Wolcher* v. *United States*, 200 F. 2d 493, and the Sixth Circuit, *Farkas* v. *United States*, 2 F. 2d 644, holding that evidence of other acts or crimes is admissible under the exception to the rule only where the commission of such other crimes by the accused is conceded or clearly proved, and said decision is in conflict with various other circuits, the Tenth Circuit and the decisions of this Court.

5. The courts generally have shown an increasing tendency to give lip service only to the rule against

the introduction of evidence of other crimes allegedly committed by a defendant to the extent that the exceptions have become the rule, with the result, as illustrated by this case, that the Sixth and Fifth Amendments to the Constitution have been violated by allowing a defendant to be tried by a partial jury; that is, an inflamed, impassioned and biased jury, thus depriving him of the essence of jury right and have deprived him of due process of law; and this Court should now draw the line of demarcation between alleged relevancy and unconstitutional jury inflamation.

ARGUMENT

I.

THE QUESTIONING BY THE COURT OF THE DEFENDANT'S EXPERT WITNESS INVADED HIS RIGHT TO JURY TRIAL

The exact question of whether there is a deprivation of a defendant's right to jury trial by reason of a trial judge asking a psychiatrist his opinion as to whether the defendant committed the act charged has never been passed upon by this Court; nor has this Court passed on the question of what constitutes asking such an opinion of an expert witness. However, this Court has directly ruled that it violates a defendant's constitutional right to jury trial for a trial court to interject his own feelings and opinions into the trial of a case. *Starr* v. *United States*, (supra). See also *Blumberg* v. *United States*, (supra), and *Blunt* v. *United States*, (supra), the latter case holding that there was an invasion of the defendant's right to trial by jury by a trial court going too far in his questioning of an expert witness called as to the sanity or insanity of the defendant.

The general principle underlying the jury right has been announced by this Court in *United States* v. *Quarles*, 350 U.S. 11, 100 L.Ed. 8, 76 S.Ct. 1, where it was held that the premise underlying the constitutional method for determining the guilt or innocence of a defendant in federal courts is that laymen are better than specialists to perform this task.

The two questions asked by the court of the expert witness that we so strenuously object to are as follows:

> "Q. (By the Court) Tell me for my information, Mr. Hughes was associating with a lot of people besides the Slussers, what is there in this thing that would indicate to you that he would select her as the victim of these letters?" (Tr. 111).
>
> "Q. You don't say he is insane but you say he wrote these letters, used a typewriter or mimeograph but he has no recollection of it? A. Yes, sir." (Tr. 112).

We submit that the questioning of the expert witness so patently and grossly violates the defendant's right to jury trial that this Court should exercise its supervisory control over the Court of Appeals and direct that Court to correct its error.

The Court of Appeals has said in regard to the questioning by the court:

> ". . . It is urged that the court's questioning tended to adduce answers from the witness to the effect that Hughes had written and distributed the material. Some of the court's questions, taken out of context, might so indicate, but the entire examination of the psychiatrist, whether by his own counsel or by the court, was on the assumption, but not the admission, that Hughes had committed the acts complained of . . ." (Opinion p. 8).

We submit that the question is not one of assumption as against admission, but rather did the trial court change an assumption to a presumption?

We can think of no more blatant denial of a defendant's right to trial by jury than for a trial court in the second question we have quoted to presume in his question a lack of insanity in spite of the legal definition of insanity (as opposed to a medical definition) and by directly asking the expert to give his opinion as to whether or not the defendant did the act charged. Each portion of the question was directed squarely at the two ultimate facts to be passed on by the jury,—(1) Was the defendant insane? (2) Did he commit the acts charged? All this, we submit, was done in a question couched in language to presume the court's own opinion.

We are constrained to submit that the opinion of the Court of Appeals so ignores the facts as to in effect deny the defendant his right to appeal from the trial court.

II.

THE RULING OF THE COURT OF APPEALS IN REGARD TO THE INTRODUCTION OF EVIDENCE OF OTHER CRIMES IS CONTRARY TO THE DECISIONS OF THE OTHER CIRCUITS AND OF THIS COURT, AND VIOLATES THE PROVISIONS OF THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Generally in the trial of one accused, evidence which shows or tends to show that an accused is guilty of other crimes and offenses is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged. (*Michelson* v. *U. S.*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168; *Johnson* v. *U. S.*, 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 704; reh. den. 318 U.S. 801, 63 S.Ct. 826, 87 L.Ed. 1164; *Hall* v.

U. S., 150 U.S. 76, 14 S.Ct. 22, 37 L.Ed. 1003; *Boyd* v. *U. S.*, 142 U.S. 454, 12 S.Ct. 292, 35 L.Ed. 1077; *Kraft* v. *U. S.*, 8th Cir., 238 F. 2d 794).

This rule of evidence has been consistently applied by all our courts and adherence to this principle is of supreme importance in assuring one accused of a crime of a fair and impartial trial before an unprejudiced jury. There are, however, exceptions to this rule which permit such proof for the purpose of showing (1) intent, (2) a common scheme or plan of criminal activity, (3) the absence of mistake or accident or (4) the identity of a perpetrator of the crime charged, where any of the foregoing items is an element of the crime charged and is at issue.

Where such evidence is permitted under one of the recognized exceptions to the rule, however, the courts have required that the exception be properly applied. (*Kompe* v. *U. S.*, 151 F. 2d 680). Thus, where evidence is offered to show intent through extraneous crimes the courts have permitted this only when intent is an issue. (*Waller* v. *U. S.*, C.A. Wash., 177 F. 2d 171; *Weiss* v. *U. S.*, C.A. La., 122 F. 2d 675; cert. den. 314 U.S. 687, 62 S.Ct. 300, 86 L.Ed. 550; re. den. 314 U.S. 716, 62 S.Ct. 478, 86 L.Ed. 570).

The various courts of appeal have consistently required that in cases falling under an exception to the general rule it is essential to the admissibility of evidence of another distinct offense that the proof be plain, clear and conclusive and evidence of a vague and uncertain character is never to be admitted. *Paris* v. *U. S.*, 260 F. 529, 171 CCA 313; *Kraft* v. *U. S.*, supra; *Labriosa* v. *Government of the Canal Zone*, 198 F. 2d 282; *Fabacher* v. *U. S.*, C.A. La., 20 F. 2d 736.

Further, the courts have consistently held that the evidence of "other crimes" must substantially establish such other crimes, the accused's connection therewith and the connection with the offense being tried by clear and convincing evidence or, at least, the making out of a *prima facie* case. *Labriosa* v. *Government of the Canal Zone*, *supra.*; *Kraft* v. *U. S.*, *supra.*; *Fabacher* v. *U. S.*, *supra.*; *Paris* v. *U. S.*, *supra.*; *Gart* v. *U. S.*, C.A. Colo., 294 F. 66. Two Circuits have specifically held that evidence of other acts or crimes on the issue of intent is admissible under the exception to the rule only where the commission of such other crimes by the accused is conceded or clearly proved. *Wolcher* v. *U. S.*, (9th Cir.), 200 F. 2d 493; *Farkas* v. *U. S.*, (6th Cir.), 2 F. 2d 644. See also *People* v. *Davis*, 343 Mich. 348, 72 N.W. 2d 269; *People* v. *Glass*, 158 Cal. 650, 112 P. 281; *State* v. *Medley*, 360 Mo. 1032, 232 S.W. 2d 519, cert. den. 340 U.S. 956, 71 S.Ct. 568, 95 L.Ed. 689). In *Kraft* v. *U. S.*, *supra.*, the 8th Circuit Court cited with approval the following language found in *Fish* v. *U. S.*, C.C.A., 215 F. 544:

> "Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused, and should be received, if at all, only in a plain case."

Our courts have further consistently held that proof of extraneous acts and crimes can be offered to prove intent, a common scheme or plan or identity, i.e. one of the recognized exceptions when, and only when, one of these is at issue as an element of the crime alleged. (*Michelson* v. *U. S.*, *supra.*; *Wolcher* v. *U. S.*, *supra.*; *Weiss* v. *U. S.*, *supra.*; *Farkas* v. *U. S.*, *supra.*)

An inquiry into a collateral crime not connected with the crime charged in the indictment has been

consistently prohibited. (*Johnson* v. *U. S.*, *supra*,; *Hall* v. *U. S.*, *supra.*; *Boyd* v. *U. S.*, *supra.*; *Toothman* v. *U. S.*, 203 F. 218, 121 CCA 424.)

Where evidence of other acts and crimes has been admitted under an exception to the rule, the showing of the details of such other crimes has been held to be wrong. *Robinson* v. *The State*, 11 So. 2d 732, 243 Ala. 684; cert. den. 319 U.S. 755, 63 S.Ct. 1168, 87 L.Ed. 1708. Where there is doubt as to whether evidence of another offense will prove the identity of the accused, that doubt should be resolved in favor of the accused and the evidence rejected. (*Labriosa* v. *Government of the Canal Zone*, *supra*). Where such evidence is admitted the comments and instructions by the trial court in relation thereto have always been deemed important and subject to careful scrutiny. (*Jones* v. *U. S.*, 10 Cir. 251 F. 2d 288). Such instructions should not be misleading. (*Bollenbach* v. *U. S.*, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350.)

In the case at bar a virtual flood of evidence of "other crimes" was admitted into the trial as competent which primarily consisted of lewd, lascivious and filthy writings distributed in the neighborhood of the complaining witness and left at the home of her relatives, none of which was circulated in the United States mail. There was no direct evidence connecting the defendant with the perpetration of these "other crimes" and the content of these lewd and filthy writings was clearly obscene and was calculated to and, it is submitted, did inflame and prejudice the jury. The connection of the accused with these extraneous exhibits was highly speculative and doubtful and yet despite strenuous and repeated objection to the receipt of these matters into evidence, the comments by the

trial court during the trial and its instruction relating thereto implied, inferred and led the jury to assume that the accused actually was the perpetrator of such "other crimes."

One particular exhibit (Exhibit 32) was left for the 11-year-old daughter of the complaining witness while she was at school (Tr. p. 77). Absolutely no connection with the letters and cards in the indictment was established and there was a complete absence of any connection with the defendant. However, the introduction of this lewd and obscene note at the very least inferred that the defendant was guilty of undertaking to corrupt the morals of the little girl or contributing to the delinquency of a minor. We again repeat that there was no connection established with the defendant, but such connection was necessarily assumed by the jury from the fact of its introduction into evidence alone, and the receipt in evidence was highly prejudicial to the defendant's rights to a fair and impartial trial.

Evidence was admitted inferring that the defendant had stolen items from the house of the complaining witness with a complete lack and absence of direct proof connecting the defendant with any such thefts. (Tr. p. 32). Evidence was permitted purporting to show that the defendant had broken into and entered the house of the complaining witness at night which was completely unconnected with the charges contained in the indictment. (Tr. p. 38).

The prosecution stated at various stages of the trial that the extraneous and prejudicial exhibits and evidence of other crimes were for the purpose of showing "*a plan, scheme and design and guilty knowledge*"

(emphasis supplied) (Tr. p. 19, 61). The trial court also commented in relation to this that the jury could consider such evidence "*in determining whether there was such a scheme as alleged in the indictment.*" (emphasis supplied) (Tr. p. 19, 61). A scheme, plan, design, intent, etc., was not an element of the crimes charged (18 USC, §§ 1461, 1463, 1718), was not alleged in the indictment, and the admission of evidence purportedly to show any of this was clearly wrong and prejudicial. In fact, even after such comments by the prosecution and the trial court there was no instruction in relation to a scheme, plan, design, or intent given. Likewise, the evidence inferring that the defendant had committed theft, burglary and had undertaken to corrupt the morals of a minor was neither mentioned nor alluded to in the court's instructions. In fact, in relation to the mass of lewd, obscene and collateral filth permitted into evidence, *the court gave no instruction concerning the necessity of connecting the defendant with it*, but the instruction which was given assumed that the defendant was the author of such extraneous exhibits and the perpetrator of such other crimes. This instruction is as follows:

> "During the trial of this case certain material, circulated in the vicinity of the Slusser home, was introduced in evidence, which was not mentioned or referred to in the indictment returned by the grand jury, and was not sent through the United States Mails. *You are instructed that those writings not mentioned in the indictment may, where permitted to go to you, be considered by you for the limited purpose of making comparisons of the spelling, phrasing, and similarities, diction, general form and so forth, with those actually used in the indictment, and upon which the Government bases its case.* They cannot be

considered by you as constituting separate or additional crimes, but only for the limited purposes as above stated. You are reminded that the writings that are crucial are those set forth in the indictment, and that the other material is submitted *only for the limited purpose of making comparisons, and to aid you in determining whether or not the defendant mailed, or circulated through the United States Mails, the post cards and letters set forth in the indictment, in violation of the Federal law.*" (emphasis supplied)

An inference necessarily arises against a defendant when a prosecution exhibit is admitted into evidence. The twelve jurors naturally assume that the trial court has weighed such evidence from a legal standpoint and found it to have probative value as against the defendant. Where the contents of such an exhibit are loathsome, lewd, obscene and vile as was predominantly the case here, the natural consequence will be prejudice and bias against the defendant from the assumption that he had authored them. Requiring the defendant to meet and rebut inferences and speculation concerning other crimes or misconduct not alleged in the indictment erodes and destroys the presumption of innocence which should obtain to the benefit of anyone accused of crime.

The Circuit Court held that the admission of such evidence was proper to show a course of conduct and to identify the defendant. A "course of conduct" was not an element of any crime charged. The evidence of unrelated crimes and misconduct was highly prejudicial, damaging and denied the defendant a fair trial. The "other crimes evidence" admitted to aid in identifying the defendant as the perpetrator of the "indictment crimes" was not tied to or connected with

the defendant except in a most doubtful, speculative and vague manner. Without this flood of collateral filth improperly admitted into evidence against the defendant, it is submitted that a verdict of guilty would never have been returned.

In affirming the judgment of the trial court, the Tenth Circuit Court has not only "reversed itself" and deviated from rules of evidence previously endorsed and approved by it as requisite to a fair trial for one accused of crime, but such a decision is now in conflict with the decisions of all other circuits and with the decisions of this Court.

It is respectfully submitted that this Court grant a Writ of Certiorari permitting a proper consideration of the improper affirmance of the errors committed at the trial of this cause and further correcting the error committed both in permitting evidence of other crimes to prove something not an element of the offenses charged and evidence of other crimes which at the best was vague, uncertain and speculative to be used against this defendant. These errors were further compounded through improper comment by the trial court upon admission of the evidence and the erroneous and misleading instructions thereafter given. To permit the decision to stand would not only deny this petitioner his rights, but will establish a precedent which will erode and eventually destroy the prohibition against use of evidence of other crimes in a criminal trial—a fundamental principle which is basic and unique to our system of justice under the common law.

III.

THE INTRODUCTION OF EVIDENCE OF OTHER CRIMES OF HIGHLY INFLAMMATORY NATURE DENIES THE PETITIONER THE PROTECTION OF THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

We have stated that this case illustrates a generalized constitutional invasion of a defendant's rights to jury trial by allowing almost indiscriminate evidence of other crimes allegedly committed by the defendant so that the jury is so inflamed by the nature of the other crimes that the jury can no longer be impartial or unbiased and unprejudiced. See generally cases collected in the following annotations: 63 A.L.R. 602 Admissibility of Evidence of Other Offenses in Criminal Prosecution to Prove Identity of Defendant. See the same annotations in 3 A.L.R. 1540; 22 A.L.R. 1016; 27 A.L.R. 357; see also 15 A.L.R. 2d 1080, Admissibility, in Prosecution Based on Abortion, of Evidence of Commission of Similar Crimes by Accused; see also 20 A.L.R. 2d 1012 Admissibility, in Prosecution for Bribery or Accepting Bribes, of Evidence Tending to Show the Commission of Other Bribery or Acceptance of Bribe. See also 170 A.L.R. 1036; 2 A.L.R. 1029; and 26 A.L.R. 542.

An examination of the above annotations and the case content shows a frightening trend to give lip service only to the introduction of evidence of other crimes so that the exception has now become the rule. We have stated that this case illustrates the point at which this Court should draw the line of demarcation between relevancy and constitutional jury invasion. In the vast majority, if not all, of the cases collected in the above cited annotations, the defendant was independently identified as the perpetrator of the "other crimes." In the instant case, there was no independent

identification of the defendant as the perpetrator of such other crimes. We therefore suggest that at this point the rule should not be merely one of evidence but a rule of constitutional right to an impartial jury. In the instant case, the proof attempting to tie the defendant not only to the indictment crimes, but to the "other crimes", and each with the other, was a highly tenuous comparison of spelling errors. Of necessity, the jury's consideration was highly colored and the scales of balance pressed down by the finger of obscenity, lewdness and lasciviousness. We therefore submit that in the instant case, the opinion of the Court of Appeals crosses the line of evidentiary rule and violates the provisions safeguarding an impartial jury provided by the Sixth Amendment for the protection of the petitioner.

CONCLUSION

It is respectfully submitted that the Petition should be granted, and the Writ issued.

CLEO FRANCIS HUGHES,
Petitioner

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APPENDIX I

(Filed July 26, 1963)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7192—June Term—1963.

CLEO FRANCIS HUGHES, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal From The United States District Court
For The District of New Mexico

Joseph C. Ryan, of the Firm of Seligman & Ryan, Albuquerque, New Mexico, for Appellant.

Lewis O. Campbell, Assistant U. S. Attorney, Albuquerque, New Mexico (John Quinn, United States Attorney, Albuquerque, New Mexico, with him on the brief), for Appellee.

Before PHILLIPS, PICKETT and SETH, Circuit Judges

PICKETT, Circuit Judge.

The defendant, Hughes, appeals from a conviction on an 8-count indictment charging him with using the mails for the delivery of nonmailable matter, in violation of 18 U.S.C. §§ 1718, 1461, and 1463.[1] This appeal presents the questions of the sufficiency of the evidence to sustain the

[1] 18 U.S.C. § 1463 declares matters which are otherwise mailable to be nonmailable if the envelope or outside cover or wrapper and all postal cards display indecent, lewd, lascivious or obscene printed matter or characters.

18 U.S.C. § 1461 prohibits the use of the mails for the delivery of obscene, lewd, lascivious, indecent, filthy or vile matters.

18 U.S.C. § 1718 applies to libelous, scurrilous, defamatory or threatening language or characters upon envelopes, outside wrappers or postcards deposited for mailing in the United States mails.

verdict; error in the admission of evidence of crimes or acts other than those set forth in the indictment; and prejudicial examination of an expert witness by the court.

At the conclusion of the prosecution's case, the court denied a motion for a judgment of acquittal. The defendant then offered evidence in his own defense, and the motion was not renewed at the conclusion of all of the evidence. We have repeatedly held that if, after the denial of a motion for acquittal or for a directed verdict, a defendant presents evidence in defense of the charge, he waives any objection he may have had to the denial of the motion. In the absence of a motion for judgment of acquittal at the close of all of the evidence, federal appellate courts will not pass upon the sufficiency of the evidence to support the verdict. Corbin v. United States, 10 Cir., 253 F.2d 646; Johns v. United States, 10 Cir., 227 F.2d 374.

In view of the insistence that the evidence is insufficient to sustain the verdict, and the statement of defendant's counsel in oral argument that the conviction is a miscarriage of justice, we, regardless of procedural deficiencies, reviewed the evidence in detail and have concluded that the verdict and the judgment and sentence thereon have ample support in the evidence. Viewing the evidence and the inferences to be drawn therefrom in the light most favorable to the prosecution, as we must,[2] it reveals that over a period of years there had been a very close association between the defendant and his wife with William J. Slusser and his wife, Ora, and their four minor children. The Slusser children spent considerable time in the Hughes' home, and were taken on numerous trips by them over a period of years. The Hughes insisted that they loved the children to the same extent as though they were their own, and continuously lavished attention and

[2] Sandoval v. United States, 10 Cir., 285 F. 2d 605, and cases cited.

expensive gifts upon them. They seemed to be particularly fond of a 13 year old daughter. In 1960 they took Mrs. Slusser and her daughter on a three weeks' trip to Florida. Early in 1961 the Slussers concluded that it would be to the best interest of the children to put a stop to this relationship, or at least to curtail it. Hughes was indignant when told of this and for a considerable time thereafter he continuously harrassed Mrs. Slusser with numerous telephone calls. At first these calls were friendly, but later his statements became abusive. The telephone calls continued until the Slussers obtained an unlisted number. In a conversation Hughes told Mrs. Slusser that he would make her sorry of the day they met, and would make her children sorry of the day that she was their mother.[3] During this

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[3] In describing the conversation, Mrs. Slusser testified:

"A. I went to the doctor, had my appointment with Dr. Bass and when I came out of the office and I started to get into the pickup, my husband was gone at the time, and I started to get into the pickup, and I think I got in the pickup, Mr. Hughes from there behind and from there across the street, and he came over to the pickup.

Q. Is that this defendant? A. Yes, sir. He tried to grab the keys and I wouldn't let him have them. I kept them in my hand and I asked him to leave me alone. He said, 'You have messed up my whole life taking Linda and those children away from me.' I said, 'You couldn't have loved those children or you wouldn't want to hurt them like you have by acting—

Q. Just say what you told him. A. I said, 'You couldn't have loved them or you wouldn't have hurt them.' He said, 'If you think I have done anything yet, what I have done to you.' He handed me a mimeographed letter. He said, 'Read this.' He said, 'I had from twenty to twenty-five of these prepared,' and he said, 'If you go in there the next time and that doctor and the nurses look at you funny,' he said, 'you will know the reason why,' and he said, 'If your neighbors stop speaking to you, you will know the reason why.' He said 'I have church council tonight and you will receive that first letter tomorrow morning—

Q. Just a minute. When he handed you this letter, did you

conversation, he also displayed a "mimeographed letter" to Mrs. Slusser, telling her that he had 20 to 25 of these prepared and that she would receive the first letter the next day. Shortly thereafter printed material came through the mail addressed and delivered to the Slussers which was exceedingly filthy, vile and lascivious. During the same period similar material was found in the mail boxes or at the homes of a number of friends, neighbors and relatives of the Slussers. This material was all reproduced by a machine which was referred to in the evidence as a "Ditto" machine. A typewritten, obscene letter was left at a school for delivery to the daughter.

The reproduced material was all prepared by the same kind of a machine, and Mrs. Slusser testified that it was of the same type as that which had been shown to her by Hughes during their conversation. Hughes was employed in an office where he used a Ditto machine that reproduced typewritten material similar to that received in the mail and distributed in the Slusser's neighborh - d. This ma-

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attempt to read it? A. Yes, sir, I read it and I tried to keep it and he tore it away from me.

Q. What, if anything, did he say about the contents of that letter? A. The contents were—

Q. What did he say about the contents? A. He didn't say anything other than, 'You think that is bad.' He said, 'Read this.'

Q. Did he use the word 'bad'? A. Yes, sir.

Q. Do you know the difference between mimeograph and ditto machine? A. No, sir, only it is ink.

Q. Take a look at Government's Exhibit 26-F. Do you see the process by which that was prepared? A. Yes, sir.

Q. State whether or not it is the same type of process. A. It was the same type as this.

Q. Was there any conversation at that time about your children, how they might feel about you? * * *.

A. No, sir, other than the fact, he said that I had ruined his life by taking Linda and the children away from him and he said if I thought he had hurt them already he had not begun yet, and he also said he had letters proving Bill and I had threatened his life."

terial was also similar to an exhibit which Hughes admitted he had prepared on the Ditto machine in connection with another matter. Throughout the exhibits there was a tendency to misspell certain words. In a known writing which Hughes prepared for a postal inspector this tendency existed as to these words. After the investigation and interview of Hughes by the postal inspector, no more such material was received through the mail or distributed in the area where the Slussers lived. Although much of the evidence is circumstantial, it appears that it would have been difficult for a jury to arrive at any other verdict than it did.

The appellant contends that the trial court erred in admitting into evidence the obscene material found by neighbors and relatives of the Slussers which was not identified with the charges in the indictment. This material was circulated during the period that similar material was sent to the Slussers through the mail. Considering the circulation of the obscene material to be a crime, this does not necessarily make it inadmissible in this case. Proof of other crimes is not ordinarily admissible in the trial of a criminal case, but such evidence may be admissible to prove "intent, design, and system," Lisenba v. California, 314 U.S. 219, 227; "a continuing course of conduct," Doty v. United States, 10 Cir., 261 F.2d 10, 13; "guilty knowledge, intent, design or mental predisposition," Harbold v. United States, 10 Cir., 255 F.2d 202, 204; "intent . . . course of conduct, or . . . the crime charged," Jones v. United States, 10 Cir., 251 F.2d 288, 294, cert. den. 356 U.S. 919; or "capacity, habit, plan, knowledge, intent, motive or identity," United States v. Frascone, 2 Cir., 299 F.2d 824, 828, cert. den. 370 U.S. 910. The evidence in this instance was admissible to establish a course of conduct and to identify the defendant.[4]

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[4] The court instructed the jury on this subject as follows:

"During the trial of this case certain material, circulated in the vicinity of the Slusser home, was introduced in evidence, which

Finally, it is contended that the court erred in its questioning of a psychiatrist who was called by the defendant to testify as to the mental competency of Hughes. It is urged that the court's questioning tended to adduce answers from the witness to the effect that Hughes had written and distributed the material. Some of the court's questions, taken out of context, might so indicate, but the entire examination of the psychiatrist, whether by his own counsel or by the court, was on the assumption, but not the admission, that Hughes had committed the acts complained of. Hughes denied any connection or knowledge of the distribution of the obscene material. When the defense of insanity was interposed, it was necessary for the psychiatrist to assume that he had committed the crime in arriving at his conclusion or opinion. This is all the court did when its questions were propounded, and they were not prejudicial. We find no merit in the assertion that the conduct of the trial judge throughout the trial displayed a prejudice against the defendant.

AFFIRMED.

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was not mentioned or referred to in the indictment returned by the grand jury, and was not sent throught the United States Mails. You are instructed that those writings not mentioned in the indictment may, where permitted to go to you, be considered by you for the limited purpose of making comparisons of the spelling, phrasing, and similarities, diction, general form and so forth, with those actually used in the indictment, and upon which the Government bases its case. They cannot be considered by you as constituting separate or additional crimes, but only for the limited purposes as above stated. You are reminded that the writings that are crucial are those set forth in the indictment, and that the other material is submitted only for the limited purpose of making comparisons, and to aid you in determining whether or not the defendant mailed or circulated through the United States mails, the post cards and letters set forth in the indictment, in violation of the Federal Law."

APPENDIX II

Petition for Rehearing

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7192

CLEO FRANCIS HUGHES, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TO THE HONORABLE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT:

The Petition of the Appellant for a rehearing of the appeal herein is based on the following grounds:

I. THE COURT HAS OVERLOOKED A FUNDAMENTAL PRINCIPLE OF LAW REGARDING THE ADMISSION OF EVIDENCE OF OTHER CRIMES AND HAS THEREBY ESTABLISHED A TOTALLY NEW AND UNPRECEDENTED RULE OF EVIDENCE BY CITING CASES, WHICH, BY THEIR FACTS, DO NOT SUPPORT SUCH UNPRECEDENTED RULE.

II. THE COURT HAS OVERLOOKED AND IN DECIDING ONE OF THE FUNDAMENTAL PORTIONS OF THE ASSIGNED ERROR WITH REFERENCE TO THE INTRODUCTION OF "OTHER CRIMES, OR ACTS," THE COMMENT OF THE JUDGE (Tr. 67) THAT THE INTRODUCTION OF THE PROOF OF SUCH OTHER CRIMES WAS ALLOWED FOR THE PURPOSE OF DETERMINING WHETHER THERE WAS SUCH A SCHEME AS ALLEGED IN THE INDICTMENT, WHERE, AS A MATTER OF FACT AND LAW, THE INDICTMENT DID NOT ALLEGE ANY SCHEME AND PROOF THEREOF WAS NOT REQUIRED.

III. THE COURT OVERLOOKED AND DID NOT DECIDE THE QUESTION OF WHETHER THE INSTRUCTION QUOTED AS FOOT-

NOTE 4 OF THE OPINION WAS A FUNDAMENTAL ERROR IN THAT IT PRE-SUPPOSED AND ASSUMED THAT THE DEFENDANT-APPELLANT HAD COMMITTED THE OTHER ACTS DESCRIBED IN SUCH INSTRUCTION.

POINT I.

This Court in its Opinion at page 8 held that the admission of the highly inflammatory and prejudicial evidence was proper to show a course of conduct, and to identify the Defendant. In each and every case cited by the Court to bring this case under an exception to the general rule that proof of other crimes is ordinarily not permissible in the trial of a criminal case, there was never any question as to the question of "other crimes," but that each defendant actually committed them.

In *Lisenba* v. *California, 314 U.S. 219, (p. 7)*, the Supreme Court held that the admission of evidence of a prior wife murder in Colorado did not violate the Fourteenth Amendment, but on the contrary that the Fourteenth Amendment left California free to adopt a rule of relevance—no question but that the defendant actually perpetrated the acts constitution the "other crimes."

In *Doty* v. *United States, 10 Cir., 261 F. 2d 10 (p. 7 of the Opinion)* this Court held that in prosecution for perjury evidence of the bribery of officers, both prior and subsequent to the defendant's testimony relative thereto was admissible, but here again there was direct proof that the defendant had actually perpetrated the "other crimes."

In *Harbold* v. *United States, 10 Cir., 255 F. 2d 202 (p. 7 of the Opinion)*, this Court held that the admission of evidence of the defendant's addiction to narcotics in his prosecution for possession and sale was not in the "other crimes" category since addiction was not a crime within itself, and this Court could not rule as a matter of law that the prejudicial effect of such evidence outweighed its

value—again the defendant and the extraneous evidence were directly connected.

In *Jones* v. *United States*, *10 Cir.*, *251 F. 2d 288 (p. 7 of the Opinion)* the prosecution therein was for conspiracy to violate a federal liquor law. There was, in addition to this, included in the conspiracy a plan to control and obtain payoffs from gambling and prostitution. Evidence of such payoffs, all introduced and admitted by this court held that this was an integral part of the entire conspiracy and fell within the recognized exception. Here, moreover, the trial court was quite careful and admonished the jury throughout the trial concerning such evidence, and, here again, the "other crimes" was directly tied to the defendants.

In *United States* v. *Frascone*, *2 Cir.*, *299 F. 2d 824 (p. 7 of the Opinion)*, the extraneous evidence objected to was elicited by defendant's counsel on cross-examination and concerned actual photographs of the defendant being viewed in the police files and those of the Federal Bureau of Narcotics. Thus, there was only the question of implication of "other crimes" raised by the defendant himself when questioning identity, when identity was not a part of the Government's case-in-chief.

We submit, and did submit, in our Brief, (pp. 31 & 32), that there is no authority in either English or American law upholding the principle that proof of "other crimes" may be admitted unless there is independent proof that the defendant did, in fact, commit such other crimes. The Court has not cited such a case in its Opinion, and the Government could not cite such a case in its Brief.

Where courts have permitted evidence of "other crimes" to be introduced under an exception to the general rule, there is not a recorded precedent-status, opinion, decision or occasion where the *identity* of the defendant with the commission of the so-called "other crimes" was not firmly

and clearly established *prior* to the introduction of any such evidence. On the contrary, the inherent dangers of such prejudicial conduct has been guarded against from the very beginning of our system of government under law and trial by jury. The rights of a defendant in this respect must remain inviolate. Conviction by innuendo if practiced and permitted will erode and destroy our basic, fundamental and sacred system of justice.

The extraneous exhibits were quite clearly highly inflammatory and extremely prejudicial. The exhibits on which the indictment was based contain *no identical "misspellings"* with the so-called comparison lists (Exhibits 29 and 37). There was a complete absence of any proof connecting the defendant with these highly inflammatory and extraneous exhibits constituting "other crimes." The treatment by the Trial Court clearly indicated to the jury that the Defendant was assumed to be the depraved perpetrator of the "other crimes" and the Defendant was thus denied a fair trial and due process of law.

Specifically, Exhibit 32, delivered to the little girl at school had no connection under any exception to the general rule, no comparative misspellings, preparations, etc., but was clearly calculated to, and did, inflame the jury and work prejudice to the defendant. In no way was the defendant connected to this, but the admission of this extraneous and prejudicial material inflamed the jury as against the defendant.

Point II.

THE COURT HAS OVERLOOKED AND IN DECIDING ONE OF THE FUNDAMENTAL PORTIONS OF THE ASSIGNED ERROR WITH REFERENCE TO THE INTRODUCTION OF "OTHER CRIMES OR ACTS," THE COMMENT OF THE JUDGE (Tr. 67) THAT THE INTRODUCTION OF THE PROOF OF SUCH OTHER CRIMES WAS ALLOWED FOR THE PURPOSE OF DETERMINING WHETHER THERE WAS SUCH A SCHEME AS ALLEGED IN THE INDICTMENT DID NOT ALLEGE ANY SCHEME AND PROOF THEREOF WAS NOT REQUIRED.

As pointed out in the Appellant's Brief, it was not necessary or incumbent on the prosecution to show any plan, system, method, intent, builty knowledge, design or mental predisposition. The loathsome, filthy and obscene details of the "other crimes" evidence would have been inadmissible even if relevant, which it obviously was not. However, the Trial Court again erred in commenting during the trial that the jury could consider such extraneous evidence "in determining whether there was such a *scheme* as alleged in the indictment." (Tr. 67).

Point III.

THE COURT OVERLOOKED AND DID NOT DECIDE THE QUESTION OF WHETHER THE INSTRUCTION QUOTED AS FOOTNOTE 1 OF THE OPINION WAS A FUNDAMENTAL ERROR IN THAT IT PRE-SUPPOSED AND ASSUMED THAT THE DEFENDANT-APPELLANT HAD COMMITTED THE OTHER ACTS DESCRIBED IN SUCH INSTRUCTION.

An inference necessarily arises against a defendant when a prosecution exhibit is admitted into evidence. The twelve jurors naturally assume the Trial Court has weighed it from a legal standpoint and found it to have probative value as against a defendant. Thus, if, as here, the contents of such an exhibit are vile, obscene and loathsome, the natural consequence will be prejudice against the defendant due to the assumption or the presumption induced

by its admission into evidence that the defendant authored it or was responsible for its distribution. Here, particularly, the "I'll tie it in—later" method of prosecution was an incurable violation of the defendant's rights.

Requiring the defendant upon trial to meet and defend against a mass of filth in the form of "other crimes" inferred upon highly questionable circumstances, none of which appears in the counts of the indictment, destroys the presumption of innocence, and denied the defendant a fair trial and due process of law.

The parade and accumulation of filthy, obscene and lewd exhibits extraneous to the indictment was clearly the dominant feature of the prosecution's case-in-chief. This was carried out throughout the trial over strenuous objections by Defendant's counsel and constituted fundamental error. The question succinctly stated by Judge Murrah in *Harbold v. United States, supra,*

> "Whether the evidential value outweighs the prejudicial effect upon the jury in the determination of guilt or innocence. . . ."

must in this case be answered in the negative.

Conclusion

It Is Submitted that this Court should grant a re-hearing to give adequate consideration to a decision that creates a totally new and novel rule of evidence with reference to the introduction of proof of "other acts and crimes" as above set forth.

Respectfully submitted,

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